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HERE COMES A NEW CHALLENGER! ESPORTS AND CALIFORNIA AB 5

PATRICK HANKINS*

INTRODUCTION

In September 2019, California signed Assembly Bill 5 (AB 5) into law which took effect on January 1, 2020. AB 5 changes the understanding of worker rights through the reclassification of independent contractors and “is anticipated to shift the classification of approximately 2 million independent contractors to employees.”¹ Media outlets covered the bill’s impact on the “gig worker economy” through the lens of rideshare drivers, but its reach also impacts another industry reliant on independent contractors: esports.² In a growing gaming industry of over 66,000 employees, an additional 144,000 individuals are contingent or gig workers.³ California is home to many video game developers, leagues, events, tournaments, and is the home state for many professional players.⁴ Depending on their obligations to their team, players can blur the distinction between employee and independent worker classification –

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¹ Richard W. Kopenhefer, *California AB 5 in Entertainment, Media and Advertising*, SHEPPARD MULLIN (Oct. 22, 2019), <https://www.laboremploymentlawblog.com/2019/10/articles/california-employment-legislation/california-ab-5/>.

² Aabicus Lee, *The Dangers of Esports Contracts: Don't Sign Before You Read This*, DAILY ESPORTS (Apr. 21, 2019), <https://www.dailyesports.gg/the-dangers-of-esports-contracts-dont-sign-before-you-read-this/>.

³ *Riot Games Selects EverHive and IES to Grow Its Global Contingent Workforce Program to Support Its Hiring Strategy*, EVERHIVE (Feb. 12, 2020), <https://everhive.com/riot-games-selects-everhive-and-ies-to-enhance-and-grow-its-global-contingent-workforce-program-to-support-its-hiring-strategy/> [hereinafter *Riot Games Partnership*].

⁴ John T. Holden & Thomas A Baker III, *The Econtractor? Defining the Esports Employment Relationship*, 56 AM. BUS. L. J. 391, 421 (2019).

a realm of uncertainty that leaves organizations potentially liable for worker mistreatment due to misclassification.⁵

Similar to companies engaged in the gig economy, esports teams prefer players to be independent contractors instead of employees, for three key reasons: (1) cost minimization, (2) ease of hiring and firing, and (3) decreased liability.⁶ Esports tournaments, leagues, and teams' financial viability are steadily improving however, "only the small top percentage of players and industry workers can make a sustainable living."⁷ Players, constantly aware of their impermanence, "are fearful of stagnation, bad luck, or performance anxiety undermining their status as paid players."⁸ The esports industry is characterized by its competitiveness, youth, and ever-changing needs; to remain competitive, "teams are incentivized to drop players if they are underperforming."⁹ Independent contractor agreements allow teams to remain flexible and keep staff only as long as they are needed.¹⁰

Generally, a player's contract includes employment terms like working hours, salary amount, organization tournament winning percentage, and sponsorship requirements¹¹ as well as duties such as "participating in team matches, practices, exhibition games, other team activities, and streaming content."¹² The extent, specificity, and duration of players' contracts can sway their worker classification from independent contractors to employees.¹³ Not only is specificity required for worker designation, but also clear boundaries of exclusive player agreements.¹⁴

California's change to worker classification can widely impact their esports industry and those that depend on it as its influence can reach other states.¹⁵ Currently, California is home to major investors and esports-related infrastructure in areas like Los Angeles, Burbank, Orange County, and San

⁵ Ferguson Mitchell, *Esports Primer: Understanding Independent Contractors vs. Employees*, ESPORTS OBSERVER (Jan. 21, 2016), <https://esportsobserver.com/esports-primer-understanding-independent-contractors-vs-employees/>.

⁶ Roger Quiles, *Are Esports Players Actually Independent Contractors?* QUILES LAW (Apr. 17, 2015), <http://www.esports.law/blog/are-esports-players-actually-independent-contractors>.

⁷ Vlad Savov, *Inside the Life of a Pro Gamer*, THE VERGE (July 21, 2014), <https://www.theverge.com/2014/7/21/5919973/inside-the-life-of-a-pro-gamer>.

⁸ Carleigh Morgan, *Gaming the System: Esports Players Face Many Challenges in Unionizing*, VICE (Aug. 10, 2016), https://motherboard.vice.com/en_us/article/53dwn5/esports-unionization-challenges.

⁹ *Id.*

¹⁰ ROGER QUILES, *THE LITTLE LEGAL HANDBOOK FOR ESPORTS TEAMS*, 8 (2d ed. 2019) (ebook).

¹¹ *Esports Player Contracts: Basic Info on How they Work*, BRITISH ESPORTS ASS'N, <https://britishesports.org/news/esports-player-contracts-basic-info-on-how-they-work/>.

¹² QUILES, *supra* note 10, at 9.

¹³ *See generally id.*

¹⁴ Collin MacGregor, *Streamer & Esports Pro Tfue Sues Faze Clan Over Contract*, HEAVY (May 20, 2019), <https://heavy.com/games/2019/05/tfue-sues-faze-clan-contract/>.

¹⁵ Francine Kiefer, *California Redefines Gig Economy. Will Rest of Country Follow?*, CHRISTIAN SCI. MONITOR (Sept. 11, 2019), <https://www.csmonitor.com/USA/Politics/2019/0911/California-redefines-gig-economy.-Will-rest-of-country-follow>.

Francisco. If the costs of supporting their organizations become too high in California, teams are likely to consider divesting from the state in search of greener pastures or completely divest from the industry. Contrary to mainstream media coverage, esports is still in a state of volatility and this change can cause a rift. AB 5 could spur esports organizations to consider the benefits of leaving California for states with more lenient labor laws; the multitude of preexisting tests for worker classification asks whether AB 5 is a necessity in a sea of existing labor protection laws and legal precedent, especially if gig worker classification varies between jurisdictions.¹⁶

This Comment begins with a recap of worker misclassification in the gig economy to explain the California Legislature's decision behind moving forward with AB 5. Second, this Comment covers the *Dynamex* decision – the foundation of AB 5. Third, AB 5's ABC test is applied to player contracts in California-based Riot Games' (Riot) League of Legends Championship Series (LCS) – the North American divisional league of the largest esports in the world.¹⁷ Next, the Comment shifts focus to affected industries' legal challenges against AB 5 and whether esports could be facing similar effects to its labor market. If so, other states' burgeoning esports markets might dethrone California as America's industry frontrunner. Finally, the Comment presents solutions to find an acceptable medium between teams' desired labor flexibility and players' need for stability and protection currently unavailable under AB 5.

I. A BRIEF HISTORY OF WORKER MISCLASSIFICATION IN THE GIG ECONOMY

The legal issue primarily addressed by AB 5 is worker misclassification and its widespread use by companies to avoid “basic worker protections like the minimum wage, paid sick days and health insurance benefits.”¹⁸ California's bill, “arguably the strongest of its kind in the nation,” gives the state and cities “the right to file suit against companies over misclassification, overriding the arbitration agreements that many businesses use to shield themselves from worker complaints.”¹⁹ AB 5's stringent requirements are supported by state employment officials' audit that found almost 500,000 workers wrongly classified as independent contractors.²⁰ Worker misclassification practices in a

¹⁶ Melissa Luna, *The Gig Economy and Worker Classification*, 62-APR ADVOC. 30 (2019).

¹⁷ The LCS is selected as a test subject because of its location in California, Riot's desire to minimize costs (despite it being the biggest esports title in the world), and inconsistencies among its various regional leagues.

¹⁸ John Myers et al., *Newsom Sign Bill Rewriting California Employment Law, Limiting Use of Independent Contractors*, L.A. TIMES (Sept. 18, 2019), <https://www.latimes.com/california/story/2019-09-18/gavin-newsom-signs-ab5-employees0independent-contractors-california>.

¹⁹ *Id.*

²⁰ *Id.*

relatively new labor market, like the gig economy, are a microcosm of the issue's long term impact in labor markets around the world.²¹

Employers' use of nonstandard or "alternative work arrangements" is not new.²² Beginning in the late 1970s, companies cut costs in human resources, customer service, and information technology by outsourcing the activities to third parties so they could focus on profitability.²³ Through the 1980s and early 1990s, the contingent workforce "grew seventy-five percent faster than the overall workforce."²⁴ By 1995, contingent workers constituted roughly "one-third of the workforce."²⁵ Continuing forward, employers repurposed part-time work to meet their needs and preference for lower costs and more flexible staffing.²⁶ From 2005 to 2015, "nearly all new net job growth" came from temp workers, on-call workers, contract workers, and freelancers.²⁷ As part of this job growth, the gig economy experienced "recent annual growth exceeding 300 percent" and its' sectors are poised to take a \$15 billion annual revenue from 2014 to a \$335 billion annual revenue by 2025.²⁸

The potential for employee misclassification grew alongside the gig economy. In 2014, the California labor commissioner's office "examined more than 300 claims for wage theft related to misclassification, a 'dramatic rise from 2011.' . . . In all, more than 500 complaints were filed in 2012 and 2013."²⁹ The practice of misclassifying employees as independent contractors "has become standard operating practice for companies looking to save on payroll costs, outbid competitors, or avoid workplace regulations."³⁰ States and the federal government took action against the practice after studies and audits revealed misclassified independent contractors' net income was "significantly less than for similar workers paid as employees" due to "their outsized tax burden, the prevalence of wage and other violations, and unreimbursed business

²¹ Michael L. Nadler, *Independent Employees: A New Category of Workers for the Gig Economy*, 19 N.C. J. L. & TECH. 443, 447 (2018).

²² Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 N. ILL. U. L. REV. 379, 386 (2019).

²³ Noam Scheiber, *Growth in the 'Gig Economy' Fuels Work Force Anxieties*, N.Y. TIMES (July 12, 2015), <https://www.nytimes.com/2015/07/13/business/rising-economic-insecurity-tied-to-decades-long-trend-in-employment-practices.html>.

²⁴ V.B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 751 (2017).

²⁵ *Id.*

²⁶ Arne L. Kalleberg, *Nonstandard Employment Relations: Part-Time, Temporary and Contract Work*, 26 ANN. REV. SOC. 341, 344 (2000).

²⁷ Cunningham-Parmeter, *supra* note 22.

²⁸ *Id.* at 381.

²⁹ Françoise Carré, *Briefing Paper No. 403, (In)dependent Contractor Misclassification*, ECON. POL'Y INST. 1, 5 (2015), <https://www.epi.org/files/pdf/87595.pdf>.

³⁰ Sarah Leberstein & Catherine Ruckelshaus, *Independent Contractor vs. Employee: Why Independent Contractor Misclassification Matters and What We Can Do to Stop It*, NAT'L EMP. L. PROJECT 1 (2016), <https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf>.

expenses.”³¹ Also, state resources such as “unemployment trust funds and workers’ compensation funds lose tens of millions of dollars annually, per state, due to misclassification. States also lose hundreds of millions of dollars in unpaid payroll taxes per year.”³²

Gig workers took to the courts to address misclassification and claim employee status – a reflection of “rising tension[s] between these new business practices and models of work and existing legal doctrines.”³³ Misclassification lawsuits highlighted inconsistencies among different states’ existing legal tests and motivated “dynamic thinking and experimentation . . . at the local [legislative] level and by workers and their advocates, exploring ways to tackle the anxieties of the new economy’s flexible working arrangements.”³⁴ Within current labor market framework, policy strategies have been suggested to minimize independent contractor misclassification such as (1) a focus on enforcing existing state laws that have broad definitions which cover workers in the on-demand economy; and (2) providing clear and expansive definitions of “employment” in workplace laws so companies cannot skirt the system.³⁵

II. THE EFFECT OF *DYNAMEX*: ASSEMBLY BILL 5 AND THE ABC TEST

AB 5 codifies the *Dynamex Operations West, Inc. v. Superior Court* case, which held that there is a presumption that workers who perform services for a hirer are employees under California’s Industrial Welfare Commission (IWC) wage orders.³⁶ Originally, the IWC enacted their wage orders in the early 2000s to regulate the minimum wage, working hours, overtime pay, and meals of workers of seventeen individual industries.³⁷ In *Dynamex*, while maintaining the definitions of employees from IWC wage orders,³⁸ the court broadly interpreted wage orders’ ‘employee’ definition to extend wage order protection to “all workers who would ordinarily be viewed as working in the hiring business.”³⁹ However, to properly consider whether a worker who falls outside a wage order definition is an independent contractor, the court applied a three-part “ABC” test, a labor law standard, to decide whether independent contractors are

³¹ *Id.* at 3.

³² *Id.* at 4.

³³ Wilma B. Liebman, *Debating the Gig Economy, Crowdwork and New Forms of Work*, 7 *SOZIALES RECHT* 221, 229 (2017).

³⁴ *Id.* at 231-32.

³⁵ NAT’L EMP. L. PROJECT, *THE ON-DEMAND ECONOMY & STATE LABOR PROTECTIONS* 3-4 (Jan. 2017), <https://www.nelp.org/wp-content/uploads/On-Demand-Economy-State-Labor-Protections.pdf>.

³⁶ *Dynamex Operations W., Inc. v. Super. Ct. of L.A. Co.*, 416 P.3d 1 (Cal. 2018).

³⁷ INDUS. WELFARE COMM’N, *SUMMARY OF INTERIM WAGE ORDER-2000*, <https://www.dir.ca.gov/iwc/SummaryInterimWageorder2000.pdf> (last visited Jan. 29, 2019).

³⁸ INDUS. WELFARE COMM’N, *INDUSTRIAL WELFARE COMMISSION ORDER NO. 12-2001 REGULATING WAGES, HOURS AND WORKING CONDITIONS IN THE MOTION PICTURE INDUSTRY*, <https://www.dir.ca.gov/IWC/IWCArticle12.pdf> (last visited Oct. 23, 2019).

³⁹ *Dynamex*, 416 P.3d at 7.

employees (unless statutorily exempted).⁴⁰ To be considered an independent contractor, a worker must satisfy the following criteria:

(A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact, (B) that the worker performs work that is outside the usual course of the hiring entity's business, and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.⁴¹

Failure to satisfy one of the test's parts is enough to establish that a worker is an employee. California's use and codification of the ABC test is not a new concept. Three other states, New Jersey, Massachusetts, and Connecticut use the broad and inclusive ABC test in wage and hour laws.⁴² Across the country, half of the states use some version of the ABC test in unemployment laws and around ten states broadly apply it to labor laws in specific sectors.⁴³

The *Dynamex* decision extends worker categorizations from an earlier decision, *Borello*.⁴⁴ Initially considered as the precedent for common law standard for distinguishing employees and contractors, *Borello* is a call for the "application of a statutory purpose standard that considers the control of details and other potentially relevant factors."⁴⁵ *Borello* considers 'right to control the work' factors from the Worker's Compensation Act which include:

(1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business.⁴⁶

Borello applies the 'control-of-work-details' test for determining whether a person rendering service to another is an employee or an independent

⁴⁰ *Id.*

⁴¹ *Id.* at 40.

⁴² Rebecca Smith, *Washington State Considers ABC Test for Employee Status*, NAT'L EMP'T L. PROJECT (Jan. 28, 2019), <https://www.nelp.org/blog/washington-state-considers-abc-test-employee-status/>.

⁴³ *Id.*

⁴⁴ *S.G. Borello & Sons, Inc. v. Dep't of Indus. Rel.*, 769 P.2d 399, 404 (Cal. 1989).

⁴⁵ *Dynamex*, 416 P.3d at 19.

⁴⁶ *S.G. Borello*, 769 P.2d at 407.

contractor.⁴⁷ In reaching their decision, the *Borello* court recognized the statutory relevance of specific laws for protected classification of laborer.⁴⁸ Therefore, *Dynamex* reiterates a policy objective of California wage orders – to protect workers’ rights.⁴⁹ AB 5 is a seemingly proper extension from California’s legislature to further this objective.

AB 5 remedies the lacking protections for workers that fall outside the protection of IWC’s wage orders by marrying benefits from *Dynamex* and *Borello*. AB 5 applies the *Dynamex* decision to establish the presumption that “for purposes of the provisions of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor” subject to the ABC test.⁵⁰ However, the ABC test is inapplicable to individuals performing work under a contract for professional services with another business entity and the *Borello* test must be applied.⁵¹

III. APPLYING AB 5 TO LCS PLAYERS

A. A Primer on Esports Leagues and the LCS

California is home to many American esports’ firsts such as the first dedicated venue,⁵² first public university esports scholarship,⁵³ and first franchised league.⁵⁴ Continuing this tradition, California is ground zero for esports’ experimental phase in league structure where organizers and game companies try to find the best format for esports’ unique needs. As a result, differences among leagues “may result in different employment status for esports competitors.”⁵⁵

Generally, two esports league structures dominate the esports industry: closed franchised leagues and open leagues. In open leagues, competitors are

⁴⁷ *Id.* at 405.

⁴⁸ *Id.* at 409.

⁴⁹ Azita Iskandar, *Employee or Independent Contractor? It Depends on Why You’re Asking*, 11 No. 5 LANDSLIDE, May–June 2019, at 42, 45.

⁵⁰ Assemb. B. 5, 2019-20 Leg. Sess. (Cal. 2019).

⁵¹ *Id.* (exempt occupations include licensed insurance agents, certain licensed health care professionals, registered securities broker-dealers or investment advisers, direct sales salespersons, real estate licensees, commercial fishermen, workers providing licensed barber or cosmetology services).

⁵² Dean Takahasi, *Esports Arena Is Coming to the Luxor Hotel in Las Vegas*, VENTURE BEAT (Apr. 11, 2017), <https://venturebeat.com/2017/04/11/las-vegas-will-get-its-own-esports-arena-at-the-luxor-hotel/>.

⁵³ Philip Kollar, *University of California, Irvine Announces a League of Legends Scholarship*, POLYGON (Mar. 30, 2016), <https://www.polygon.com/2016/3/30/11330776/league-of-legends-university-california-irvine-esports-scholarship-riot>.

⁵⁴ Andrew Evers, *Gamers for this Video Game League Train Harder Than Some Pro Athletes, and Now It Aims to Compete with the NFL for Viewers*, CNBC (May 16, 2018), <https://www.cnbc.com/2018/05/16/overwatch-league-emulating-major-league-sports-but-for-gamers.html>.

⁵⁵ Holden et al., *supra* note 4, at 421-22.

free from the event organizer's control and direction aside from tournament rules which they agree to.⁵⁶ This Comment will not consider open leagues against the backdrop of AB 5 because these leagues are characterized by their inconsistency – league oversight is diffused and partnerships with publishers and competitors are impermanent.⁵⁷ Conversely, closed esports leagues consist of a single entity that governs over all league teams. Closed American leagues such as the LCS, Blizzard Activision's Overwatch League,⁵⁸ Call of Duty League, and the NBA's 2K League, consist of franchise models that started a "trend" that moved organizations' players towards employee status.⁵⁹

The LCS consists of ten franchised *League of Legends* (League) teams that all live in Los Angeles and play at the LCS Arena.⁶⁰ Despite rumors in the past,⁶¹ LCS rules do not explicitly require teams to sign their players as employees; all signed players and coaches' services are exclusive to a single team.⁶² AB 5 would presumptively classify LCS players and coaches as employees. Legal challenges to this designation would be decided under the ABC framework but would ultimately fail. The following sections consider the stage of the LCS against all three parts of the ABC test: freedom from control, outside the usual course of business, and independent trade.⁶³

B. Part A: Freedom from Control

Player contract requirements under LCS rules do not satisfy part A of the framework because they prohibit players and coaches from providing their services to any other teams or organizations. In *Dynamex*, to decide if part A is satisfied by a worker's role, the court considered the "type and degree of control a business typically exercises over employees."⁶⁴ Naturally, the more control a

⁵⁶ *Id.* at 426.

⁵⁷ *See id.* at 427.

⁵⁸ Overwatch League's (OWL) first two seasons took place in the Blizzard Arena in Burbank but have moved to home game formats requiring teams to find venues in their home market. Regardless of the change, OWL's rules require players to be signed as employees to their respective teams. *See Overwatch League Official Rules, Terms, and Conditions Inaugural Season Version 1.0*, OVERWATCH LEAGUE (2018), <https://rlewisreports.com/wp-content/uploads/2018/03/OWLRulebook.pdf>.

⁵⁹ Ellen Zavian, *For Esports Players, the Tax Man Cometh*, WASH. POST (Jan. 24, 2020), <https://www.washingtonpost.com/video-games/esports/2020/01/15/esports-players-tax-man-cometh/>.

⁶⁰ *See* LCS Tickets, LEAGUE OF LEGIONS, <https://nexus.leagueoflegends.com/en-us/2020/01/lcs-tickets/> (last updated January 2020).

⁶¹ Jacob Wolf, *Riot Plans to Mandate Teams Give Players Employee Benefits*, ESPN (Nov. 1, 2016), https://www.espn.com/esports/story/_/id/17945538/league-legends-riot-plans-mandate-teams-give-players-employee-benefits (reporting in 2016 the LCS would mandate teams provide employee benefits such as healthcare and 401(k) retirement plans to professional players).

⁶² 2020 Official Rules LCS and LACS, LEAGUE OF LEGENDS (Jan. 17, 2020), https://nexus.leagueoflegends.com/wp-content/uploads/2020/01/2020-LCS-Rule-Set-v20.1_6bkbwz26cgp7fngat6a.pdf.

⁶³ *Dynamex Operations W. v. Super. Ct. of L.A. Cty.*, 416 P.3d 1, 7 (Cal. 2018).

⁶⁴ *Id.* at 36.

business has over a worker, the more likely a worker would be considered an employee. Also, as recorded by *Borello*, the higher the level of control an employer holds over a worker, the more likely that the individual is an employee.⁶⁵ Subject to LCS Rule 3.11, players and coaches are only allowed to compete for the team they have an agreement with – a level of control that rises to employment.

C. Part B: Outside the Usual Course of Business

Part B is not satisfied by professional League players. Workers who perform roles comparable to employee roles include “individuals whose services are provided within the usual course of the business . . . and thus who would ordinarily be viewed by others as working in the hiring entity’s business.”⁶⁶ Though players can have diversified revenue streams, organizations typically contractually require their players to display team marks and sponsors in these activities. For example, it is commonplace for players to livestream themselves playing League as another source of income, but organizations provide the player with stream overlays that display team sponsors. For an esports organization to survive, its brand and influence must span across multiple mediums of media, so any kind of gaming and social media content is within the usual course of a team’s business.

D. Part C: Independent Trade

Part C is not satisfied by professional League players. To prove that a worker engaged in an independently established trade, occupation, or business, the individual takes steps to establish and promote an independent business.⁶⁷ Generally, when teams contract with players, they sign the individual to a services agreement, not a player’s incorporated business (if they have one). Under *Dynamex*, a League player agreement is a unilateral independent contracting action by the team because even though players stream themselves playing to get noticed, the organizations do not allow their players to continue to offer their services to several potential clients suggesting that the team is misclassifying players’ class of worker.⁶⁸

⁶⁵ *Id.*

⁶⁶ *Id.* at 37.

⁶⁷ *Id.* at 39 (other than incorporation, promotions and establishment of an independent business include licensure, advertisements, and routine offerings to provide service). *Id.*

⁶⁸ *Id.*

E. Main Takeaways

Subject to the ABC test, LCS players should be considered employees. However, even outside of the *Dynamex* decision and AB 5, an employee classification would still stand. Historically, courts have held the employment relationship between parties is not strictly defined by the existence of an independent contractor agreement.⁶⁹ For illustration, in states that do not have explicit employer classification tests or presumptions, players in the LCS can still be considered employees.⁷⁰ Before the *Borello* decision and settling on *Dynamex* as a foundation, to determine the relationship between a hirer and an employee, evidence would be found that an employer had “the right to control the actual details” of a hired worker’s product.⁷¹ At a federal level, under the lens of the economic realities test and common law agency test, professional League players would be considered employees.⁷² Fair Labor Standard Act decisions that incorporated the economic reality standard held that [e]conomic realities “not contractual labels, determine employment status.”⁷³ The traditional common-law agency test requires the application of several non-exhaustive factors that include: (1) skill required for the job; (2) source of instruments and tools; (3) work location; (4) relationship duration; (5) whether the hiring party has the right to assign additional projects to the hired party; (6) extent of the hired party’s discretion over when and how long to work; (7) payment method; (8) the hired party’s role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business; (11) the provision of employee benefits; and (12) the tax treatment of the hired party.⁷⁴ Maximization of a right to control pushes League players’ classification in favor of employee status.

IV. THE SALTY RUNBACK: NEGATIVE REACTIONS AND CHALLENGES TO AB 5

AB 5’s reception is not free from criticism. Though the bill is a boon for gig workers, businesses modeled behind using independently contracted labor, like esports organizations, may face sustainability problems regardless of whether they comply with classification requirements.⁷⁵ Once a worker classifies as an

⁶⁹ Carlsmith Ball, *Consequences of Misclassifying Employees*, 3 No. 10 PAC. EMP. L. LETTER 6 (1999).

⁷⁰ Holden & Baker, *supra* note 4.

⁷¹ Tieberg v. Unemployment Ins. Appeals Bd., 471 P.2d 975, 982 (Cal. 1970).

⁷² Holden & Baker, *supra* note 4.

⁷³ Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 750 (9th Cir. 1979).

⁷⁴ Laurie E. Leader, *Whose Time Is It Anyway?: Evolving Notions of Work in the 21st Century*, 6 BELMONT L. REV. 94, 102 (2019).

⁷⁵ KJ Helms, *California’s Assembly Bill 5: Disruption of Gig Economy?*, PRWEB (Oct. 23, 2019),

employee, the employer has costs for Social Security and payroll taxes, unemployment insurance taxes and state employment taxes, providing worker's compensation insurance, and mandatory compliance with state and federal statutes that control the wages, hours, and working conditions of employees.⁷⁶ To verify these employee-related expenses are paid, the state's Employment Development Department perform audits to seek out tax-evading practices such as worker misclassification.⁷⁷ Failing these audits can result in crippling financial punishment from the state and open businesses to action under the Private Attorneys General Act (PAGA).⁷⁸ To compensate for the costs that accompany employment, businesses could be compelled to raise costs for consumers which would inevitably reduce revenue – amplifying sustainability struggles that some nonexempt industries are already experiencing.⁷⁹ Companies and nonexempt workers frustrated with new worker classification requirements seek relief and preservation in court and new legislation.

A. Gig Worker Businesses Reel from AB 5's Regulations

Companies operating in California's "gig economy" are already experiencing the influence of AB 5 standards. The San Diego Superior Court granted the State's February 2020 preliminary injunction filed against Maplebear Inc., the parent company of Instacart, after the Judge determined under AB 5's ABC test, the on-demand grocery delivery service likely misclassified a majority of its Californian workers.⁸⁰ As part of its defense, Maplebear claimed that a preliminary injunction ordering it to hire tens of thousands of Instacart personal shoppers ("Shoppers") would irreparably harm the business because it would have to "develop rules, protocols, and

https://www.prweb.com/releases/california_s_assembly_bill_5_disruption_of_gig_economy/prweb16663197.htm.

⁷⁶ Timothy Kim, *The Dynamex Decision: The California Supreme Court Restricts Use of Independent Contractors*, SHEPPARD MULLIN (May 1, 2018), <https://www.laboremploymentlawblog.com/2018/05/articles/class-actions/dynamex-decision-independent-contractors/>.

⁷⁷ Michael Studenka, *How AB5 Has Changed the Employment Landscape*, FORBES (Feb. 19, 2020), <https://www.forbes.com/sites/michaelstudenka/2020/02/19/ab-5-has-changed-the-landscape>.

⁷⁸ Cal. Lab. Code § 2699 (West 2016) (authorizes aggrieved employees to file lawsuits to recover civil penalties on behalf of themselves, other employees, and the State of California for labor code violations). PAGA worker misclassification actions can include "minimum wage violations, missed meal and rest periods, unpaid overtime, unreimbursed business expenses, record-keeping violations, steep penalties, attorneys' fees, and even criminal liability." Studenka, *supra* note 77.

⁷⁹ Carolyn Said, *Some Sectors Warn That AB5 Could Hurt Workers, Raise Prices*, S.F. CHRON. (Sept. 5, 2019), <https://www.sfchronicle.com/business/article/Some-sectors-warn-that-AB5-could-hurt-workers-14414684.php>.

⁸⁰ Cyrus Farivar, *Judge Blocks Instacart From Misclassifying Its California Workers*, NBC NEWS (Feb. 25, 2020), <https://www.nbcnews.com/tech/tech-news/first-judge-rules-instacart-has-misclassified-its-california-workers-n1142286>.

management teams to monitor the new employees' performance and control their work" as well as "invest[ing] in infrastructure, such as supervisory staff and software, to enforce new rules on how Shoppers allocate their time."⁸¹ According to Maplebear, these mandatory changes would require them to redesign Instacart's business model and software to ensure Shoppers actively and exclusively worked for Instacart during the pre-scheduled, compensable time.⁸² As a result of a more rigid management system that would need to be in place, Instacart's prices would be forced to change.⁸³ Though ruling against Maplebear, the Judge acknowledged if the mandatory modifications to Instacart's business model were as severe as the company claimed, Shoppers would find themselves looking for new work or leaving California altogether.⁸⁴

B. Nonexempt Workers Seek Relief

Though proponents of AB 5 believe the legislation will strengthen worker's rights, workers whose professions fall outside the bill's exemptions, like independent commercial truck drivers and freelance journalists, pursue relief from AB 5 to preserve their livelihoods.

1. Independent Commercial Truck Drivers

After an AB 5 federal court challenge, the California Trucking Association (CTA) prevailed on its suit for a preliminary injunction to enjoin the bill's enforcement against independent truckers.⁸⁵ In their complaint, the CTA claimed, to avoid trucking service liability, AB 5 required motor companies to use employee drivers rather than individual owner-operators.⁸⁶ As a result, motor carriers' prices would rise to compensate for a complete business model revamp, the significant costs of maintaining a fleet of trucks, and the expenses incurred to meet Labor Code and Wage Order protections for employee drivers.⁸⁷ Alongside higher prices, motor carriers would offer fewer services to its customers because special services formerly performed by independently contracted individual owner-operators would be unavailable until carriers could

⁸¹ *People v. Maplebear Inc.*, No. 2019-48731, at *4 (Super. Ct. Cal. San Diego Cty. Feb. 18, 2020) (order granting preliminary injunction).

⁸² *Id.* The defendant claimed that a large new workforce would require them to request their engineers and scientists to analyze shopping patterns to design systems that would manage, secure, and schedule employees shifts as opposed to the flexibility of the current platform. *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Cal. Trucking Ass'n v. Becerra*, 433 F. Supp. 3d 1154, 1171 (S.D. Cal. 2020).

⁸⁶ Second Amended Complaint for Declaratory and Injunctive Relief at 16, *Cal. Trucking Ass'n v. Becerra*, 433 F. Supp. 3d 1154, 1171 (S.D. Cal. 2020) (No. 3:18-cv-02458-BEN-BLM), 2019 WL 7877141.

⁸⁷ *Id.* at 18.

afford necessary equipment and experienced personnel.⁸⁸ Operationally, motor carriers would have to exercise more control over drivers' routes and working conditions for three main reasons: (1) reconfigured routes would have to ensure drivers could legally and safely park trucks to take mandated meal and rest periods; (2) rigid routes would be implemented to minimize carriers' costs of owning vehicles and hiring statutorily protected employee drivers at the expense of productivity and increased fuel consumption, and (3) routes would need to keep employee drivers and cargo within California.⁸⁹ The Southern District of California found that the significant impact AB 5 compliance would have on motor carriers' prices, services, and routes violated motor carrier protections afforded under federal law, which allowed CTA to receive an injunction; however, CTA's complaint shows the extent of AB 5's effects that would make businesses reliant on independent contractors nonsensical or, at the very least, inefficient to operate in California.⁹⁰

2. Freelance Journalists, Writers, and Photographers⁹¹

In December 2019, Vox Media published a statement sharing its decision to cut hundreds of California freelance writing jobs from its SB Nation blog network because AB 5 made Californian operations "impossible."⁹² A day after the announcement, two freelance groups jointly filed their own federal AB 5 challenge claiming the bill's quantitative limitations on contracted creative work violated freelancing journalists, writers, and photographers' First and Fourteenth Amendment rights and, as a result, threatened their livelihoods.⁹³ Though AB 5 exempts photographers and freelance writers from the *Dynamex* test as "professional services," they may not provide more than thirty-five "content submissions" per year.⁹⁴ The freelancers claim that AB 5's limitations "bring[] significant new costs and disadvantages": the bill requires a "client-

⁸⁸ *Id.* at 16.

⁸⁹ *Id.* at 17.

⁹⁰ See *Cal. Trucking Ass'n*, 433 F. Supp. 3d at 1163 (explaining that Plaintiff's challenge that the Federal Aviation Administration Authorization Act of 1994 (FAAA) contains "an express preemption provision, which provides that states 'may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property'" that defeats AB 5's ABC test); *Cal Trucking Ass'n*, *supra* note 86, at 17.

⁹¹ Though this comment primarily focuses on professional gamers' contracts with teams and organizations, esports has its own niche in sports, technology, and lifestyle journalism that depends heavily on freelancer writers, journalists, and photographers with specialized industry knowledge. Many of these freelancers probably share in the concern that employment would reduce their ability to not only be flexible with whom they provide their services, but also how they value their work.

⁹² John Ness, *Thank You, California*, SB NATION (Dec. 16, 2019, 12:00 PM), <https://www.sbnation.com/2019/12/16/21024100/thank-you-california>.

⁹³ Complaint for Violation of Federal Civil Rights Under 42 U.S.C. s 1983 Declaratory and Injunctive Relief at 2-3, *Am. Soc'y of Journalists & Authors, Inc. v. Becerra*, No. CV 19-10645 PSG (KSx), 2020 WL 1444909 (C.D. Cal. Mar. 20, 2020) (No. 2:19-cv-10645), 2019 WL 6877868.

⁹⁴ Cal. Lab. Code §§ 2750.3(c)(2)(B)(ix)-(c)(2)(B)(x) (West 2020).

turned-employer” to pay freelancer-turned-employee costs like “unemployment taxes, workers’ compensation taxes, state disability insurance, paid family leave, and sick leave” which “all make [the freelancers’] work more costly—and thus less attractive—to the client-turned-employer.”⁹⁵ At the time of filing, the freelancers claimed the possibility of employers being punished for an AB 5 violation “has already resulted in lost freelancing opportunities.”⁹⁶ Conversely, freelancers are also disincentivized from abandoning freedom and workload flexibility in an unstable industry where exclusive employment does not constitute a safe harbor.⁹⁷ Unlike professions in the gig economy who benefit from reclassification, freelancer writers and photographers’ established careers would be upended.⁹⁸ As independent contractors, freelancers can choose “to adapt their workload to their financial needs, balance their work with their other responsibilities, and spread their workload across multiple clients to minimize risk.”⁹⁹ For example, by retaining copyright ownership, freelancers can license their works for additional income.¹⁰⁰ By transitioning to employees, freelancers are must relinquish personal copyright ownership over their creative works unless they negotiated retention rights.¹⁰¹ To the freelancers filing suit, AB 5 imposes an unreasonable content limit that threatens the very existence of sustainable work.

C. Legislative Challenges to AB 5

Nearly three dozen bills seeking to modify, or repeal AB 5 have flooded the California Legislature since it received the governor’s signature.¹⁰² However, this subsection only explores four bills to consider various options that could curb significant costs in California’s esports industry and allow organizations to remain operational.

⁹⁵ Am. Soc’y of Journalists & Authors, Inc, *supra* note 93, at 7.

⁹⁶ *Id.* at 8.

⁹⁷ *Id.*

⁹⁸ *Id.* at 9.

⁹⁹ *Id.* at 8.

¹⁰⁰ Am. Soc’y of Journalists & Authors, Inc, *supra* note 93, at 8.

¹⁰¹ *Id.*

¹⁰² Hannah Wiley, *California’s New Labor Law Is a Work in Progress. Here’s How Lawmakers Could Change It*, SACRAMENTO BEE (Feb. 24, 2020, 11:02 AM), <https://www.sacbee.com/news/politics-government/capitol-alert/article240264901.html>.

1. Drastic Measures: Senate Bill 806 and Assembly Bill 1928

Senate Bill 806 (SB 806) and Assembly Bill 1928 (AB 1928) are products of AB 5's staunchest opponents who call for the bill to be completely repealed and replaced.¹⁰³

Authors behind SB 806 believe that AB 5 is an “anti-worker law” that “decimate[s]” industries.¹⁰⁴ SB 806 would replace the codified *Dynamex* ABC test with a new, more expansive three-part test that presumes a worker is an employee rather than an independent contractor unless the employer can demonstrate the worker is:

(1) free from the control and direction of the hiring entity in connection with the performance of the work, *both under the contract for the performance of the work and in fact, determined by a preponderance of factors, with no single factor of control being determinative, and either* that (2) the person performs work that is outside the usual course of the hiring entity's business, *or the work performed is outside the place of business of the hiring entity, or the worker is responsible for the costs of the place of the business where the work is performed, or that* (3) the person is customarily engaged in an independently established trade, occupation, or business *of the same nature as that involved in the work performed.*¹⁰⁵

The changes added to the *Dynamex* test intend to accurately reflect “today's economic and worklife [sic] balance realities” by “provid[ing] maximum flexibility in allowing for independent contractor relationships in order to endure that all those industries, businesses, and professions that legally and appropriately enjoyed independent contracting relationships. . . can continue to do so.”¹⁰⁶

AB 1928's authors echo similar concerns to SB 806 but seek change through a complete reversion. Claiming to have received hundreds of bill-related inquiries voicing AB 5 concerns, its authors believe that building momentum to

¹⁰³ Patricia Bates, *Assembly Bill 5 Takes a Sledgehammer to Worker Freedom*, ORANGE CTY. REG. (Feb. 25, 2020, 10:00 AM), <https://www.ocregister.com/2020/02/25/assembly-bill-5-takes-a-sledgehammer-to-worker-freedom/>.

¹⁰⁴ Wiley, *supra* note 102.

¹⁰⁵ S. B. 806, 2019-2020 Reg. Sess. (Cal. 2020) (emphasis added).

¹⁰⁶ *Id.* § 1(o).

change the bill as quickly as possible will preserve livelihoods.¹⁰⁷ Noting AB 5's "expansive nature" and the "significant and immediate impact of lost income" caused by its regulations, AB 1928 seeks status, effective immediately, as an urgency statute to repair the thousands of disrupted work relationships by repealing existing AB 5 and returning to the previously used *Borello* factors.¹⁰⁸

2. Changing Definitions

State Sen. Patricia Bates' proposed Senate Bill 867 (SB 867) and Senate Bill 868 (SB 868) indirectly resolves some of the Plaintiff's claims in the Freelancer Complaint¹⁰⁹ by creating an indefinite classification exemption for independent contractors that work for newspaper distributors or carriers¹¹⁰ including photographers, photojournalists, and videographers.¹¹¹ These changes reflect Bates' AB 5 criticism claiming the bill's "one-size-fits-all policy" was a "sledgehammer" approach that "ripped economic opportunities away from people who want to remain independent" and a reflection of her request that legislators "use a scalpel to help Californians who have been unfairly classified."¹¹² Bates' bills relieve some freelancer concerns without completely dismissing beneficial AB 5 protections.

3. Changing Classification

Though she voted for AB 5, State Sen. Cathleen Galgiani proposed Senate Bill 1039 (SB 1039), "The Independent Worker Rights Act of 2020," which creates a third worker classification "with basic rights and protections relative to work opportunities, including minimum wage and occupational accident coverage."¹¹³ The bill calls the binary classifications of independent contractor and employee "outdated and inapposite of the current reality of the labor market and work opportunities presented in the gig economy and the desire of workers seeking flexible working conditions."¹¹⁴ Labor groups have criticized SB 1039 as a threat to workers' rights because it fails to consider workers unable to choose independent contracting over employment and creates an exploitable "substandard category of worker."¹¹⁵ Though a new worker class would

¹⁰⁷ Mark Anderson, *New Bill Seeks Immediate Freeze of AB 5 Employee Rules*, SACRAMENTO BUS. J. (Jan. 29, 2020, 3:16 PM), <https://www.bizjournals.com/sacramento/news/2020/01/29/new-bill-seeks-immediate-freeze-of-ab-5-employee.html>.

¹⁰⁸ Assemb. B. 1928, 2019-2020 Reg. Sess. (Cal. 2020).

¹⁰⁹ Am. Soc'y of Journalists & Authors, Inc., *supra* note 93.

¹¹⁰ S. B. 867, 2019-2020 Reg. Sess. (Cal. 2020).

¹¹¹ S. B. 868, 2019-2020 Reg. Sess. (Cal. 2020).

¹¹² Bates, *supra* note 103.

¹¹³ S. B. 1039, 2019-20 Reg. Sess. (Cal. 2020).

¹¹⁴ *Id.* § 1(b)(5).

¹¹⁵ Wiley, *supra* note 102.

inevitably consist of lower protections than employment under AB 5, the concept is not novel.

In other countries, separate worker classification categories for on-demand labor already exist.¹¹⁶ To resolve some of the disputes caused by the reclassification of gig workers, a third category could combine some of the benefits normally reserved for employees but exclude overtime and minimum wage standards.¹¹⁷ This framework used in places like Canada, Italy, and Spain has been met with mixed results; however, it speaks to the importance of considering secondary or even tertiary effects when changing the definition of employment.¹¹⁸

D. Why Does Any of This Matter to Esports?

Across the entire esports industry, one of the most pressing issues is solvency.¹¹⁹ Investors' desires to own and operate premier esports teams, organizations, and leagues are supported by understandable enthusiasm, but without a stable model for sustainability, those dreams are vaporware at best. California has been America's longstanding hotbed for esports investment, but if AB 5 is hastily enforced, these regulations can compel even the most entrenched, well-known organizations and games to leave the state. Even California-based Riot Games, "a key driver of the explosive growth of esports" as host of the *League of Legends* World Championship—the "most widely viewed and followed esports tournament"—still finds ways to save costs in managing its "contingent workforce program."¹²⁰ Esports organizations are more akin technology startups (like those that gig worker laws target), so remaining efficient and building revenue streams to have a stronger base for spending is paramount.¹²¹ Building leagues atop stable platforms begins with a labor market that allows esports to grow.

AB 5 is a systematic change to California labor classification which not only increases labor costs but also materially changes the state's employment practices. As a result, key players in California's esports industry hoping to

¹¹⁶ Angela Chen, *This Is One Way Uber and Lyft Want to Get Around Making Drivers Employees*, MIT TECH. REV., Sept. 13, 2019, <https://www.technologyreview.com/s/614308/uber-lyft-ab5-gig-workers-labor-classification-third-category-tech-policy/>.

¹¹⁷ Miriam A. Cherry & Antonio Aloisi, "Dependent Contractors" in the Gig Economy: A Comparative Approach, 66 AM. U. L. REV. 635, 649 (2017).

¹¹⁸ *Id.* at 689.

¹¹⁹ Marty Strenczewilk, *An Owner's Perspective: Public Salaries and Pro Sports Comparisons*, SPLYCE (2016) (Marty Strenczewilk is the co-founder and CEO of Splyce, a North American-based technology and professional esports organization with players and staff based out of Europe, North America, and Asia. Splyce's "MAD Lions" *League of Legends* team and "Toronto Defiant" *Overwatch* teams are franchised in their respective professional leagues).

¹²⁰ *Riot Games Partnership*, *supra* note 3.

¹²¹ Strenczewilk, *supra* note 119.

minimize costs may look to other states like Nevada and Texas because of their flexible labor laws and preexisting investment in esports infrastructure.

In 2015, Nevada's Senate Bill 224 (SB 224) was signed into law and created a "conclusive presumption" that a worker is an independent contractor if certain criteria are satisfied.¹²² Under the test in SB 224, players are likely employees, but teams have a chance to use additional facts to challenge the classification. Even if a worker does not satisfy the test, "no contrary presumption of employee status exists. Rather, an employer may still present other evidence to show that the worker should be considered an independent contractor."¹²³ This caveat possibly allows teams to trial players on a short basis without signing them to employment agreements or committing to their services for an extended period.

Outside the potentially beneficial change in the state's labor policy, Governor Brian Sandoval has publicly announced Nevada's desire to become "the esports capital of the world" by using their existing gaming industry to serve esports' needs.¹²⁴ In Las Vegas, the state and country's entertainment capital, the bet on esports is an opportunity to bring in a younger demographic.¹²⁵ Nightclubs have been converted to dedicated esports venues with technological capabilities worthy of some of esports' biggest names and greatest moments.¹²⁶

Texas is a big name in American esports. Though California can claim many esports firsts, the lone star state was arguably the birthplace of American

¹²² Rico Cordova & Calder Huntington, *Nevada Senate Bill 224: Conclusive Presumption of Independent Contractor Status, and What It Means for Employers*, 24 NEV. LAW., Jan. 2016, at 16 (under SB 224, a worker is an independent contractor if: A. The person possesses, or has applied for, an employer identification number or social security number, or has filed an income tax return for a business or for earnings from self-employment with the Internal Revenue Service (IRS) within the previous year (unless the person is a lawfully present foreign national); B. The person is required by the contract with the principal to hold any necessary state or local business license and to maintain any necessary occupational license, insurance or bonding; and C. The person meets three or more of the following criteria: (1) the person has control and discretion over the means and manner of the performance of any work and the result of the work; (2) the person has control over the time the work is performed (subject to certain exceptions where the work contracted for is entertainment); (3) the person is not required to work exclusively for the principal. (Exceptions to this criterion are if the limitation is because of a law, regulation or ordinance restricting services to a single principal, or if the limitation is for a limited period of time pursuant to a written contract); (4) the person is free to hire employees to assist with the work; and, (5) The person contributes a substantial investment of capital in the business of the person. (S.B. 224 provides a non-exclusive list of examples of substantial investments, such as leasing work space from the principal) *Id.* at 17-18 (SB 224 only applies to Nevada's state wage and hour laws, for Fair Labor Standard Act minimum wage and overtime claim, the economic realities test will apply)).

¹²³ *Id.* at 16.

¹²⁴ Eric Van Allen, *Las Vegas Takes First Legal Esports Wagers in U.S. for IEM Oakland*, ESPN (Nov. 18, 2016), https://www.espn.com/esports/story/_/id/18082536/las-vegas-takes-first-legal-esports-wagers-us-iem-oakland.

¹²⁵ Steve Robertson, *Grand Opening of First Ever Permanent Las Vegas Esports Arena*, ESPORTS IN L.V. (Feb. 13, 2017), <https://www.esportsinlasvegas.com/grand-opening-first-las-vegas-esports-arena/>.

¹²⁶ See Nick Statt, *Ninja's Fortnite Tournament was an Exhilarating and Unprecedented E-sports Experiment*, VERGE (Apr. 24, 2018), <https://www.theverge.com/2018/4/24/17272632/fortnite-battle-royale-tournament-ninja-tyler-blevins-e-sports-competition-las-vegas>; see also Michael Martin, *Capcom Cup 2018 Heads to Esports Arena Las Vegas*, CAPCOM, U.S.A., INC. (Sep. 14, 2018), <https://capcomprotour.com/capcom-cup-2018-heads-esports-arena-las-vegas/>.

esports.¹²⁷ Until the late 2000s, Dallas was the country's capital of esports.¹²⁸ Now, Dallas-Fort Worth (DFW) is reinvesting heavily to "level[] up."¹²⁹

In 2017, three major esports organizations moved to DFW and within a year, their reported investments in esports acquisitions, investments and development projects valued at over \$100 million.¹³⁰ Outside professional esports, four local colleges claim to have school-sponsored esports programs, two esports facilities opened in nearby Frisco and Arlington, and their OWL franchise, the Dallas Fuel has moved to the area from Los Angeles.¹³¹

History and growth aside, DFW has much to offer the esports industry: a centralized location easy to access from East or West coasts, open-minded investors, and its status as a technology hub.¹³² Also, Texas' labor laws are more lax than California's. Texas' basic rule of employment class is employment at will, "which applies to all phases of the employment relationship."¹³³ Thus, "absent a statute or an express agreement (such as an employment contract) to the contrary, either party in an employment relationship may modify any of the terms or conditions of employment, or terminate the relationship altogether, for any reason."¹³⁴ As previously discussed, labor flexibility for esports organization is key to remaining competitive and current to the rest of the industry, so employment-at-will serves many teams' purposes. As for worker classification, the state defines employment "as a service performed by an individual for wages under an express or implied contract for hire, unless it is shown to the satisfaction of the Commission that the individual's performance of the service has been and will continue to be free from control or direction under the contract."¹³⁵ The essential elements of Texas' employment definition are "service, wages, and direction and control."¹³⁶ To determine whether a worker is an employee or an independent contractor, Texas uses a twenty-factor comparative approach that may vary based on the facts of a case.¹³⁷ Though the

¹²⁷ Jacob Wolf, *Esports Scene Flourishes in Dallas-Fort Worth*, ESPN (June 21, 2018), https://www.espn.com/esports/story/_/id/23868444/dallas-fort-worth-becomes-second-capital-esports-us.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Tex. Workforce Comm'n, *Pay and Policies – General*, TEX. WORKER COMM'N, https://twc.texas.gov/news/efte/pay_and_policies_general (last visited Mar. 25, 2020).

¹³⁴ *Id.*

¹³⁵ Tex. Workforce Comm'n, *Classifying Employees & Independent Contractors*, TEX. WORKER COMM'N, <https://twc.texas.gov/businesses/classifying-employees-independent-contractors> (last visited Mar. 25, 2020).

¹³⁶ *Id.* ("Direction and control can be present in an employment relationship even if the employer does not exercise direction and control, but retains the right to do so").

¹³⁷ See TEX. WORKFORCE COMM'N, *EMPLOYMENT STATUS – A COMPARATIVE APPROACH*, <https://twc.texas.gov/files/businesses/form-c-8-employment-status-comparative-approach-twc.pdf> (last visited Mar. 25, 2020) (Factors include: (1) instruction, (2) training, (3) integration, (4) services rendered, (5) hiring, supervising, and paying helper, (6) continuing relationship, (7) set hours of work, (8) full time required, (9) location where services performed, (10) order or sequence set, (11) oral or written reports, (12) payment

state's classification does not guarantee players are independent contractors, Texas' labor tests allow for organizations to remain flexible in their hiring practices because the state's laws allow both workers and hiring entities to terminate and modify agreements as well as possesses a classification system that lacks rigidity in considering whether a worker is an independent contractor or employee.

In short, current case law and other successful esports markets warn California and its Legislature that if it cannot establish a labor law structure that serves the purposes of both the employer and employee, California might remain esports testing ground, but only just. In turn, places like Texas will reclaim and rebuild their legacy in the industry and Nevada will show its neighbor that the upstart will overtake the master.

V. POTENTIAL SOLUTIONS UNDER AB 5: REMAINING ATTRACTIVE TO TEAMS AND LEAGUES

To mitigate potential losses due to worker reclassification, the argument for player unions and collective bargaining becomes stronger than ever before. A prudent holistic approach would be to reexamine "historical models such a traditional multiemployer benefit plans established by collective bargaining agreements, requiring contributions designed for workers in industries where transient employment is the norm and allowing individuals who switch from work with multiple employers."¹³⁸ LCS teams already have healthy financial support, but smaller California-based organizations lose any incentive for investing and developing the state's esports industry. In traditional sports, these associations provide a legal framework for players to effectively negotiate for salaries and maintaining their brands.¹³⁹ However, the seemingly obvious solution of establishing a players' union to collectively bargain for underrepresented players is inconvenienced by the esports' status as a global force. Establishing a framework that can support a global entity is difficult because it requires a preexisting functional system between owners and players' associations that creates "trust among all stakeholders – game producers, event operators, players, agents, associations, and media platforms."¹⁴⁰

by the hour, week or month, (13) payment of business and travel expense, (14) furnishing tools and equipment, (15) significant investment, (16) realize profit or loss, (17) working for more than one firm at a time, (18) making service available to the public, (19) right to discharge without liability, (20) right to quit without liability).

¹³⁸ Liebman, *supra* note 33, at 234.

¹³⁹ Anthony Nel, *Esports Associations & Player Unions: Is It Time for Another Look?*, RED BULL (Apr. 9, 2018), <https://www.redbull.com/za-en/esports-associations-and-player-unions>.

¹⁴⁰ Ellen M. Zavian & Jim Schmitz, *Genesis of an Industry: The Emerging Workforce and Regulations of Esports*, 37 No. 3 ACC DOCKET 24 (2019).

In California's entertainment industry, there are technical and stage talents that freelance their services to productions that are afforded to members of SAG-AFTRA, the WGA West, IATSE, Hollywood Teamsters Local 399, and Studio Utility Employees Local 724 - worker unions that have told their members that AB 5 will not impact their industry practices.¹⁴¹ In their respective collective bargaining agreements (CBA), these unions permit members to continue operating loan-out companies, which makes an individual an employee who gets "loaned out" to an employer. For players who compete in non-franchised, non-exclusive leagues, a loan-out company may be a way of retaining independence and marketplace desirability. However, even if a player uses a loan-out structure, incorporates themselves as an LLC for tax purposes, it is still possible that competing from a different state might trigger Californian law, like tax law.¹⁴² The fear in the entertainment industry is that without an exemption for entertainment workers in the law, these loans out companies - which could be beneficial to professional players - could become defunct.¹⁴³

CONCLUSION

This Comment does not intentionally support a particular partisan position - the reality of AB 5 is that its sweeping regulations are based on a lack of understanding of the totality of the gig economy. Current California courts have been flooded with complaints by worker groups challenging AB 5 for seemingly forgetting about their needs. This Comment serves a similar purpose-to shine a light on the needs of California's esports industry lest the state is apathetic of its presence or its level of investment. As other markets fight tooth and nail to attract the seemingly golden goose that is esports, the reality is that industry organizations will seek out flexibility and stability while the players desire an unhostile atmosphere where they can freely negotiate without fear of being marginalized.

AB 5 is not totally to blame if esports shrink in California. Presently, esports' growth has been a double-edged sword. To esports' detriment, maintaining lofty multimillion (sometimes multibillion) dollar evaluations has taken precedent over curing industry mistreatment. For progress, lobbying for industry-dedicated solutions must be considered. As of right now, further growth in California is wishful thinking.

¹⁴¹ Ashely Cullins, *Hollywood Faces "Devastating" Costs From California Bill Targeting Gig Economy*, HOLLYWOOD REP. (June 19, 2019), <https://www.hollywoodreporter.com/news/hollywood-faces-devastating-costs-state-bill-targeting-uber-1219575>.

¹⁴² Zavian, *supra* note 59.

¹⁴³ *Id.*

